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UNITED STATES DISTRICT COURT**DISTRICT OF NEVADA**

David J. DiNunzio,

Petitioner,

v.

Brian Williams, et al.,

Respondents.

Case No.: 2:21-cv-00995-APG-NJK

Order

The respondents filed a motion to dismiss and petitioner David DiNunzio filed a series of subsequent motions. The respondents argue that DiNunzio has failed to exhaust state court remedies for one of the two grounds for relief in his habeas petition. DiNunzio asks for leave to amend his petition and for appointment of counsel. I deny all the pending motions.

I. PROCEDURAL BACKGROUND¹

Having been charged with murder and robbery in the Eighth Judicial District Court for Clark County, Nevada, DiNunzio entered a negotiated plea of guilty to second-degree murder. He was sentenced to 10-years-to-life. DiNunzio appealed.

The Nevada Court of Appeals affirmed the judgment of conviction. DiNunzio initiated state post-conviction proceedings in March 2019. After holding an evidentiary hearing on DiNunzio's claims, the state district court denied relief. DiNunzio appealed and the Nevada Court of Appeals affirmed.

¹ This section is based on the exhibits filed at ECF Nos. 20/21.

1 In May 2021, this court received DiNunzio’s federal habeas petition with a motion for
2 leave to proceed *in forma pauperis* that the court subsequently denied. ECF No. 1. Upon
3 payment of the filing fee, the court ordered the Clerk of Court to serve the petition on the
4 respondents. ECF No. 7.

5 After the respondents filed their reply in support of their motion to dismiss, DiNunzio
6 filed a motion to file an additional exhibit (ECF No. 27), a motion for leave to amend (ECF No.
7 29), a motion for appointment of counsel (ECF No. 30), and a renewed motion for leave to
8 amend (ECF No. 32).

9 II. DISCUSSION

10 A. *The Exhaustion Requirement*

11 A federal court will not grant a state prisoner’s petition for habeas relief until the prisoner
12 has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509
13 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a “fair opportunity” to act
14 on each of his claims before he presents those claims in a federal habeas petition. *O’Sullivan v.*
15 *Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A
16 claim remains unexhausted until the petitioner has given the highest available state court the
17 opportunity to consider the claim through direct appeal or state collateral review proceedings.
18 *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374,
19 376 (9th Cir. 1981). “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts
20 available state remedies only if he characterized the claims he raised in state proceedings
21 *specifically* as federal claims.” *Lyons v. Crawford*, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis
22 in original), *amended*, 247 F.3d 904 (9th Cir. 2001).

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1 B. *DeNunzio exhausted Ground 1.*

2 In Ground 1, DiNunzio alleges that his sentence violates his constitutional right to an
3 impartial or unbiased judge. ECF No. 8 at 3-5. The claim is premised on comments the trial
4 judge made at DiNunzio's sentencing hearing. In their motion to dismiss, the respondents argue
5 that DiNunzio failed to exhaust the claim because, in presenting his judicial bias claim on direct
6 appeal, he failed to allege a federal constitutional violation. In his response to the motion,
7 DiNunzio does not specifically address this argument but asserts that "to dismiss [the claim] for
8 technicality [sic] or procedural errors would be unfair because I was not appointed counsel in
9 order to avoid those type of errors." ECF No. 25 at 8.

10 The respondents are correct that DiNunzio did not allege a federal constitutional violation
11 in claiming on direct appeal that his sentence was tainted by judicial bias. *See* ECF No. 20-26.
12 However, he raised his judicial bias claim in his state post-conviction proceeding. ECF No. 21-3
13 at 11 and ECF No. 21-24 at 7-8. In that proceeding, he alleged a violation of his constitutional
14 rights and cited to the Supreme Court of Nevada's decision in *Martinez v. State*, 961 P.2d 143,
15 145 (Nev. 1998), which applied the Eighth Amendment requirement that defendants "be
16 sentenced individually, taking into account the individual, as well as the charged crime." *Id.* The
17 Nevada Court of Appeals ruled that the claim was barred under the law-of-the-case doctrine.
18 ECF No. 21-28 at 4.

19 The Ninth Circuit has held that citation to state case law that applies federal constitutional
20 principles is sufficient to establish exhaustion. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th
21 Cir. 2003) (en banc). Thus, while the respondents are correct that DiNunzio did not exhaust
22 Ground 1 in his direct appeal, he did exhaust the claim in his state post-conviction proceeding.
23 And although the Nevada Court of Appeals found the claim barred, the respondents have not

1 pled, much less demonstrated, that the law-of-the-case doctrine is adequate to bar federal court
2 review. *See Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003) (explaining the pleading and
3 burden of proof principles for a procedural default defense).

4 *C. DiNunzio's motions*

5 A month after the respondents filed their reply in support of their motion to dismiss,
6 DiNunzio filed a motion asking “to file one additional exhibit.” ECF No.27. In response to the
7 motion, the respondents correctly pointed out that DiNunzio’s proposed “exhibit” consists of
8 “supplementary facts and legal argument pertaining to his claim in Ground 1” and that
9 “DiNunzio appears to be moving this Court to allow him to amend his petition.” ECF No. 28
10 at 2.

11 Rather than file a reply in support of his motion, DiNunzio filed a motion for leave to
12 amend his petition. ECF No. 29. In response to that motion, the respondents argued, in part, that
13 DiNunzio failed to comply with Local Rule, LR 15-1(a), which requires the movant to attach the
14 proposed amended pleading to a motion for leave to amend. ECF No. 31 at 3-4. DiNunzio then
15 filed another motion for leave to amend attaching a proposed amended petition. ECF No. 32.

16 With all three motions, DiNunzio is merely attempting to supplement Ground 1 with
17 additional legal argument and factual allegations. As noted above, Ground 1 is based on
18 comments made by the trial judge during DiNunzio’s sentencing hearing. The factual allegations
19 supporting Ground 1 are sufficiently stated in DiNunzio’s initial petition. With or without
20 DiNunzio’s proposed amendment, my consideration of Ground 1 will include all remarks made
21 by the trial judge at the sentencing hearing, a transcript of which is part of the record in this case.
22 *See* ECF No. 20-19. In addition, any legal argument DiNunzio wishes to make should be
23 reserved for his reply to the respondents’ answer. Consequently, DiNunzio’s proposed

1 amendments are unnecessary so his motions seeking to amend his petition (ECF Nos. 27, 29, 32)
2 are denied on that basis.

3 Finally, DiNunzio filed a motion for appointment of counsel. ECF No. 30. This is
4 DiNunzio's fourth motion asking me to appoint counsel. *See* ECF Nos. 9, 13, 23. Once again, I
5 recognize that DiNunzio, like most habeas petitioners, lacks legal training and resources. But his
6 renewed motion for appointment of counsel does not provide grounds for me to alter my prior
7 decisions.

8 IV. CONCLUSION

9 I THEREFORE ORDER that the respondents' motion to dismiss (ECF No. 19) is
10 DENIED.

11 I FURTHER ORDER that DiNunzio's motions asking to amend his petition (ECF Nos.
12 27, 29, 32) and for appointment of counsel (ECF No. 30) are also DENIED.

13 I FURTHER ORDER that the respondents have until **November 4, 2022** to file their
14 answer to DiNunzio's petition. In all other respects, my order of June 4, 2021 (ECF No. 7)
15 continues to govern these proceedings.

16 Dated: August 28, 2022

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18 U.S. District Judge Andrew P. Gordon
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